IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

MFA.No. 833 of 2002()

IC.NO.89/2000 OF THE EMPLOYEES INSURANCE COURT, PALAKKAD

APPELLANT: APPLICANT

FRANCE PAUL, PAULY INDUSTRIES, SAW MILL ROAD, THRISSUR-7.

BY ADVS. M/S.N.P.SAMUEL & REJITH KUMAR V.R.

RESPONDENTS: OPPOSITE PARTIES
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1. REGIONAL DIRECTOR, E.S.I CORPORATION, THRISSUR-1.

2. THE RECOVERY OFFICER, E.S.I. CORPORATION THRISSUR-1

BY ADV. SRI.T.V.AJAYAKUMAR

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

M.F.A.NO. 833 OF 2002 B

Dated this the 25th day of January,2007

JUDGMENT

The appellant is running a small scale industrial unit under the name and style "Pauly Industries" at Koorkanchery Village, Thrissur District. The Insurance Inspector visited the establishment of the appellant on 16.7.1999 and verified the attendance register, wages register, cash book and general ledger for the period from April 1996 to March 1999. In the inspection report, it is stated that on going through the register, wages were seen paid to nineteen employees from 1.1.1997 to 4.1.1997. He also found, in addition to the wages, salary was paid to one driver and one clerk during January, 1997. On the basis of the inspection report, a demand was made by the first respondent directing the appellant to comply with the provisions of the Employees' State Insurance Act in respect of his establishment with effect from 1.1.1997. The Appellant challenged the demand made by the first respondent in I.C.No.89 of 2000 before the Employees'

Insurance Court. The Employees' Insurance Court dismissed the application filed by the appellant by the order impugned in this appeal.

2. The case of the appellant is that at no point of time, more than nineteen persons were employed in his establishment. The first respondent, on the other hand, takes the stand that apart from the nineteen employees to whom wages were paid by the appellant, a clerk and a driver were also employed by the appellant during the relevant period and, therefore, the total number of employees employed by the appellant were above twenty.

3. Before the Employees' Insurance Court, the appellant was examined as AW1 and Exts.A1 to A18 were marked on his side. The Insurance Inspector who conducted the inspection was examined as RW1 and the inspection report was marked as Ext.B1. The court below relied on the inspection report and held that twenty one employees were employed by the appellant.

The court below found that Ext.A7 attendance register and wage register produced by the appellant is not a genuine document. In Ext.A7, names of nineteen persons are shown as employees. As against the name of serial number 10 Raj (Anto M.C.), it is noted as clerk and as against the name of serial number 15 Rajan, it is shown as salesman. The signatures of these two persons are not seen obtained in Ext.A7. The contention of the first respondent is that the original wage register and attendance register verified by the Inspector has been suppressed by the appellant and a fabricated document is produced by him. In Ext.A15 ledger for the year 1996-97, RW1 has put his signature and date, while such a signature is not seen in Ext.A7. At pages 55 and 82 of Ext.A15, the signature of RW1 is put and the seal is fixed. At page 55, it is seen that two persons were regularly paid monthly salary of Rs.2,000/- and Rs.1,750/-. At page 82 of Ext.A15, a sum of Rs.8,326/- has been shown as total wages. The court below concluded that this payment can be in respect of employees whose names were entered in the attendance

register and wage register which were verified by RW1. On that finding, it was held that twenty one persons were being employed by the appellant.

4. In Ext.B1 inspection report, the names of the driver and clerk are not shown. It has come out in evidence that on the dates of inspection, the employer was present on one occasion. RW1 stated in evidence that he did not ask the employer about the names and other details of the driver and the clerk. Suggestions were made to RW1 on behalf of the appellant that the total number of persons employed by him was only nineteen and out of them, one person was being engaged as clerk and another as salesman. It was suggested to RW1 that there is no material to indicate that apart from those nineteen persons, two other persons were being employed by the appellant at any point of time. In that context, RW1 admitted that the ledger would not indicate that a driver and a clerk were being employed apart from the nineteen persons. He also stated in evidence that out of the nineteen employees, any person

could be employed as driver or clerk. RW1 stated that he does not know whether any attempt was made to establish that apart from the nineteen persons mentioned in the inspection report, two other persons were being employed as driver and clerk. It is pertinent to note that in the inspection report, the names of driver and clerk are not mentioned. At pages 55 and 82 of Ext.A15, there is no mention of any driver having been appointed by the appellant. In the inspection report, there is no mention of a salesman having been appointed by the appellant. From where did the Inspector got the information that a person was appointed as driver by the appellant, is not indicated either in the inspection report or in the evidence of RW1. On a perusal of the registers with the assistance of the counsel appearing for the parties, I could not find any entry showing that a driver was appointed. The evidence adduced by PW1 or RW1 does not throw light on the question whether any person was appointed as driver and if so, who was that person. In short, the materials produced before the court do not

pointedly indicate as to who were the twenty one persons employed by the appellant in his establishment. Probably, the appellant could adduce better evidence. He could examine Raj and Rajan, whose names occur in Ext.A7, to show that those persons were being employed by him as clerk and salesman respectively. The appellant did not take any step to examine those persons. RW1 did not state specifically whether apart from Raj and Rajan some other persons were employed by the appellant either as clerk or salesman or as driver. In the facts and circumstances of the case, I am inclined to set aside the order passed by the Employees Insurance Court and to remand the matter to the court below for fresh disposal.

5. The learned counsel for the appellant submitted that even if a driver and a clerk were appointed by the appellant, they cannot be counted for the purpose of finding out the total number of employees as, according to him, the driver and clerk are not employees. The counsel referred to Section 2

(12)(b) and 2(9) of the Employees' State Insurance Act. The counsel for the appellant also relied on the decision in **The Management of Government Soap Factory, Bangalore** v. **The Presiding Officer, Labour Court, Bangalore and others** (AIR 1970 Mysore 225) and contended that there must be proximate relationship between the work of the employee and the manufacturing process so as to term a person as an employee within the meaning of the Act. The learned counsel for the first respondent submitted that the definition of factory in Section 2(12)(b) itself would indicate that in order to constitute a person an employee within the meaning of the Act, it is not necessary that he should be involved in the manufacturing process and it is sufficient that in an establishment wherein twenty or more persons are employed, a manufacturing process is being carried on in any part of the factory. He also relied on Section 2(9) of the Act and submitted that a person employed in any work connected with the administration of the factory or establishment or any department or branch thereof would also come within the

definition of employee. He pointed out that there are several decisions touching upon this point including the decision of the Supreme Court in **Royal Talkies, Hyderabad and others** v. **Employees' State Insurance Corporation through its Regional Director, Hill Fort Road, Hyderabad** (AIR 1978 SC 1478) and **Saraswath Films** v. **Regional Director, E.S.I.Corporation** (2003 (1) KLT 886(SC)). I do not propose to decide that question in this appeal since I am satisfied that that question need be decided only after a finding as to whether the driver and clerk mentioned in the inspection report are persons other than the nineteen persons mentioned in the inspection report. That is a primary question to be decided and then only the aforesaid question whether a driver or a clerk would be included in the definition of employee would arise.

6. The learned counsel for the respondents submitted that an appeal under Section 82 of the Act would be entertained only on a substantial question of law. The substantial questions of law formulated in

the appeal read as follows:

> "(a) When the list of employees prepared by the E.S.I.Inspector did not contain the details regarding name, father's name, designation, length of service etc. of the employees, can such a list be accepted as valid in the eye of law to determine the number of employees in an establishment?
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> (b) Is not the finding of the court below vitiated by non-consideration of relevant evidence and also by an essentially erroneous approach to the issue?"

As stated earlier, I do not propose to decide the first question in this appeal. As regards the second question of law, I am of the view that the finding of the court below is vitiated due to non-consideration of relevant evidence and due to non-consideration of the vital question to be considered in arriving at the finding of fact. It is not mentioned anywhere in the register (on a perusal of the same with the assistance of the counsel) or in any document kept by the appellant that any person was employed as driver. There is no evidence on that aspect. It is also not clear whether the driver and clerk mentioned in the

inspection report were employed by the appellant in addition to the nineteen persons mentioned in the inspection report and in the attendance register. There is dearth of evidence and therefore, the court below was not right in arriving at a conclusion against the appellant. On the basis of the evidence already on record, I am of the view that both parties could be afforded a further opportunity to adduce such other evidence as they wish to adduce. An opportunity should also be given to produce such other documents as may be relevant. If any document or register in the possession of the appellant is found necessary or material for the decision of the case, such document could be called for either by the court suo motu or at the instance of the respondents. It is also open to the parties to further examine and/or cross examine PW1 and RW1. The court below shall decide the case afresh and render a finding on all the disputed questions.

In the result, the Miscellaneous First Appeal is allowed. The order passed by the Employees' Insurance

Court is set aside and the case is remanded to the court below for fresh disposal in the manner indicated above. No order as to costs. Send back the records.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

M.F.A.NO. 833 OF 2002 B

JUDGMENT

25th January, 2007